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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-168096

February 9, 1970

Dear Mr. Secretary:

In considering H.R. 14794, the fiscal year 1970 appropriation bill for the Department of Transportation and related agencies, the House Committee on Appropriations requested that it be provided with the advice of the Comptroller General on the legality of the "parking equalization" plan contemplated by the Department of Transportation incident to the physical consolidation of its headquarters activities in two Southwest Washington, D.C., buildings: the Federal Office Building 10A (FAA Building) and the Nassif Building now being completed. H. Rept. No. 91-642, November 13, 1969, p. 9. Your letter of November 26, 1969, invites our attention to the request of the Committee and to the need of the Department for an early resolution of the question of the legality of the plan.

You are advised that the "parking equalization plan, whereby the Department seeks to make parking privileges available to its employees at the same cost whether they be located in Federal Office Building 10A, a Government-owned building, or in the Nassif Building, a privately owned building located within two blocks of FOB 10A, is in our opinion legally objectionable in that it does violence to the scheme of property and financial control reflected in 40 U.S.C. 303b.

Briefly stated, the problem which the Department seeks to resolve by the "parking equalization" plan stems from the fact that the parking facilities in the Nassif Building are, by a lease of the building owner, controlled and operated by a commercial automobile parking firm, Parking Management, Inc. (PMI), which apparently contemplates charging \$35 a month for the parking of an individual car, whereas the current employee parking fee at FOB 10A, operated by Government Services, Inc., under an agreement with the General Services Administration, is \$6.25 a month. To avoid such a disparity in parking costs between employees working in FOB 10A and those in the Nassif Building, and any adverse effect upon the operations of the Department from the lowering of morale due to the apparent inequity of the situation or the high cost of Nassif Building parking, the Department has been negotiating with PMI for the firm's operation of FOB 10A parking facilities together with those at the Nassif Building "as a single facility" at a uniform rate payable by the Department's employees to PMI: \$23.25 per month for the first year with annual increases of one dollar a month for the next 4 years.

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Under the contemplated arrangement, which the Department would enter into by virtue of a delegation of management authority from the General Services Administration, PMI is to issue 775 parking contracts for FOB 10A and 1800 parking contracts for the Nassif Building to employees specified by the Department. This in essence is the "parking equalization" plan.

In an opinion dated November 24, 1969, furnished with your letter of November 26, 1969, the General Counsel of the Department stated:

"No law or regulation of which we are aware requires that parking arrangements be made separately for each building or limits the Secretary's discretion to manage parking facilities in separate buildings on a common basis. It might be argued that the legality of the plan is questionable in that it would result in a private contractor receiving funds for space utilized in a Government-owned building far in excess of any service rendered by the contractor. This argument would have validity, however, only if these DOT employees who will happen to be assigned to work in FOB 10A are viewed as a class somehow separate and apart from their colleagues who happen to be assigned to work in the Nassif Building, and if one ignores the fact that the service rendered by the contractor relates to both FOB 10A and the Nassif Building."

Although we agree with the General Counsel that Department employees assigned to work in FOB 10A should not be viewed as a class apart from those assigned to work in the Nassif Building, and that there should not be ignored the fact that the service to be rendered by the contractor would relate to both FOB 10A and the Nassif Building, we are of the view that the "single facility" concept sought to be advanced, which combines Federal parking facilities together with private facilities on the basis of a common operator, is seriously questionable in that it ignores the fact that the principal ingredient of a parking facility is space, an element of the property involved, not the services of an operator or an attendant. This is so whether the parking accommodations are public or private. Since the fees to be collected go beyond a realistic charge for the management services to be performed and necessarily involve revenues from the use of property, the fact that Federal property is involved cannot be ignored.

We view the contemplated agreement with PMI, while couched in terms of management services, as necessarily conferring an interest in Federal

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property, a leasehold interest from which revenues are derived, in contravention of 40 U.S.C. 303b, which stipulates that the leasing of United States properties shall be for a money consideration only and moneys so derived shall be covered into the Treasury as miscellaneous receipts. We may also add that in the absence of statutory authority therefor we generally would view as unauthorized the use of Federal property to help finance the procurement of private services. See 31 U.S.C. 484 and 487.

Your letter also refers to another question raised in the Committee's consideration of the leasing of the Nassif Building on which you request our views. Whether in that situation, involving a twenty-year lease of nine floors plus storage space of a ten-story office building located in a highly congested urban area and used as a departmental headquarters building, appropriated funds may be used to provide space for employee parking, in the basement or sub-basements of the building. An opinion on this question has also been informally requested by the General Services Administration whose leasing function is involved. It may be noted that while the parking facilities in the Nassif Building have been leased to a private firm, also for a term of twenty years, the question of authority to procure space for employee parking is not considered moot as we understand there is the possibility of subleasing space for that purpose.

The Federal Property and Administrative Services Act of 1949, as amended, authorizes the General Services Administrator to enter into lease agreements for periods not in excess of twenty years "on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements * * * and to assign and reassign space therein to Federal agencies." 40 U.S.C. 490(h)(1). In the exercise of the leasing and space assignment functions the Administrator is governed by such policies and directives as may be prescribed by the President. 40 U.S.C. 486(a). To the extent that the appropriations of the General Services Administration are inadequate therefor, "the Administrator of General Services may require each Federal agency to which leased space has been assigned to pay promptly by check to the Administrator of General Services out of its available appropriations * * *." 40 U.S.C. 304(c), act of August 27, 1935, 49 Stat. 886, as amended. See, also, Bureau of the Budget Circular A-11, sec. 13.5(1) on reimbursement of General Services Administration by tenant agencies.

In connection with the question of the availability of appropriated funds to provide leased facilities for employee parking, reference has repeatedly been made to a decision of this Office, 43 Comp. Gen. 131,

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rendered August 5, 1963, to the Secretary of the Treasury. That decision considered the question of whether the Commandant of the Coast Guard, under his authority to equip, operate, maintain, supply, and repair Coast Guard districts and shore establishments (14 U.S.C. 93(j)), may lease a plot of land adjacent to the Coast Guard Base at Mobile, Alabama, and expend appropriated funds to prepare the land for use as an employee parking lot. In justification for the proposed use of appropriated funds it was explained that the Base was located in a badly deteriorated former commercial area without adequate public transportation and having virtually no parking space on or off nearby streets. The total personnel involved was 181, only a part of which was permanently assigned to the Base, and the number of vehicles to be accommodated each day ranged from 85 to 100 which had to be parked in a wide area around the Base. We held in that case the record did not establish the proposed parking lot was essential to the operation or maintenance of the Base so as to warrant the use of appropriated funds for a purpose that ordinarily was considered the responsibility of the individual, the parking of his private vehicle.

We consider the decision of 1963 to have little relevance to the present situation. Factually, the earlier case turned primarily on the record presented. There is little if any similarity between the two cases except that they involve the growing urban problem of motor vehicle parking. Legally there was not considered in that case the leasing authority of the General Services Administration under the Federal Property and Administrative Services Act.

The position is advanced in a memorandum dated June 21, 1968, of the then General Counsel of the Department of Transportation and concurred in by the present General Counsel, a copy of which was forwarded with your letter, that in determining the space requirements of an agency, and whether employee parking facilities are to be provided, the policies for the assignment of office buildings and space proscribed in Executive Order 11035, July 9, 1962, issued pursuant to the Federal Property and Administrative Services Act, are controlling. The memorandum stated in part:

"The policies and directives governing the exercise of the Administrator's authority were prescribed by the President in Executive Order No. 11035 (27 F.R. 6519). The Executive Order requires, among other things, that the Administrator be guided, as a primary consideration, by the need for the efficient performance of the agencies' missions and programs 'with due regard for the. . .

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maintenance and improvement of the working conditions of employees.' In addition, the order requires that the Administrator be guided by the need to provide Government employees with 'safe, healthful, and convenient conditions of employment.'"

While we consider the position of the General Councils to have merit, we need not pursue the matter as we find the General Services Administration has in effect implemented the general policies of the Executive order with respect to parking facilities for vehicles of employees. GSA Order PBS 7030.2B, April 18, 1968. The order states that such parking facilities may be leased by GSA in connection with the leasing of space to be assigned to Federal agencies--

"Where it is determined that in order to employ and retain personnel to perform the work of the agency or agencies at a particular location, and thus avoid a significant impairment of the operating efficiency of the agency or agencies, parking spaces for vehicles of employees used to provide transportation to and from the place of work may be furnished by the Government.
* * *." (Par. 10c.)

The order goes on to list the factors to be considered in making the necessary determination.

You are advised, with respect to the question under consideration, that if a determination is made that the situation involved in the leasing of the Nassif Building is such as to warrant the leasing of parking facilities for vehicles of employees under paragraph 10c of GSA Order PBS 7030.2B, we perceive no objection to the use of the appropriations of the Department of Transportation for that purpose as is used to reimburse GSA for the rental of the Nassif Building. See 40 U.S.C. 34. CP. 45 Comp. Gen. 27 (1965).

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable
The Secretary of Transportation